IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

HUNT,

Plaintiff,

v.

CHECK RECOVERY SYSTEMS, INC.,

Defendant.
_____/

No. C05-04993 MJJ
ORDER MODIFYING CLASS CERTIFICATION
AND GRANTING PLAINTIFF'S MOTION
FOR APPROVAL OF CLASS NOTICE PLAN

INTRODUCTION

Before the Court is Plaintiffs Brandy Hunt and Brian Castillo's (Plaintiffs") Motion for Approval of Class Notice Plan. FN1 ("Notice Motion"). Defendant Imperial Merchant Service, dba Check Recovery Systems ("Defendant') opposes the motion. Also before the Court is Plaintiff's Motion for Clarification or Modification of Class Certification Order. FN2 (Modification Motion"). Defendant does not oppose this motion.

For the following reasons, the Court **GRANTS** Plaintiffs' Motion for Approval of Class Notice Plan

1. Docket No. 94
2. Docket No. 97

and **MODIFIES** the class certification as set forth below.

FACTUAL BACKGROUND

Plaintiffs Hunt and Castillo filed their complaints on December 5, 2005 and March 16, 2006, respectively. On May 9, 2006, this Court issued a Related Case Order relating Plaintiffs' cases. Plaintiffs seek declaratory judgment, damages and costs based on Defendant's violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.* ("FDCPA"). Plaintiffs alleged that Defendants violated the FDCPA by attempting to collect an interest charge in addition to the check amount and a statutory service charge.

March 20, 2007, the Court issued an order denying Defendant's motion for summary judgment and granting in part Plaintiffs' motion for summary judgment ("Summary Judgment Order"). In that order, the Court agreed with Plaintiffs that Defendant's collection letters violated the FDCPA because they demanded interest as well as the amount of the check and the statutorily authorized service charge, which violated 15 U.S.C. §§ 1682e(2)(A) and 1692f(1). The Court granted Plaintiff's motion for summary judgment as to Defendant's liability under those sections.

Also on March 20, 2007, by separate order, the Court granted Plaintiffs' motion to certify class ("Certification Order"). The class comprises all persons to whom Defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge on a dishonored check; (2) where the check was written in the State of California for personal, family, or household purposes; and (3) whose mail was not returned as

undeliverable. (Certification Order, p. 14.) The Court further certified, under rule 23(b)(2), "issues of liability, declaratory relief, and statutory damages under the FDCPA for those class members who did not pay any portion of the *statutory service charge*." (*Id.*) (emphasis added.) In addition, the Court certified under Rule 23(b)(3) "the issues of actual damages under the FDCPA for those class members who paid any portion of the *statutory service charge* demanded." (*Id.*) (Emphasis added.)

Taken together, Plaintiffs' motions constitute a request that the Court modify the definition of the class and approve Plaintiff's notice to that class. Because the extent of the class will determine the nature of the notice, the Court will first analyze Plaintiffs' Motion for Clarification or Modification of Class Certification Order and will then turn to their Motion for Approval of Class Notice Plan.

LEGAL STANDARD

A. Modification of Class Certification

Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal court. The rule requires a court to determine "at an early practicable time" whether the action merits class certification. Fed.R.Civ.P. 23(c)(1)(A). The order certifying the class must "define the class and the class claims, issues, or defenses. . .". Fed.R.Civ.P. 23(c)(1)(B). In addition, a court can divide a class into subclasses and treat each subclass as a class. Fed.R.Civ.P. 23(c)(4). The Court has discretion to alter or amend the certification order "before final judgment." Fed.R.Civ.P. 23(c)(1)(C).

B. Approval of Class Notice Plan

"For any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class." Fed.R.Civ.P. 23(c)(2)(A)(emphasis added). On

the other hand, when a court certifies a class under 23(b)(3), the court "must" direct to class members "the best notice practicable under the circumstances." Fed.R.Civ.P. 23(c)(2)(B). The best practicable notice should include "individual notice to all members who can be identified through reasonable effort." *Id.*

In addition to requiring notice, the rules also dictate the style and substance of the notice. The notice must "concisely and clearly state in plain, easily understood language" several elements. *Id.* These include "the nature of the action, the definition of the class certified, the class claims, issue, or defenses, that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under rule 23(c)(3)." *Id.*

ANALYSIS

A. Modification of Class Certification

The court, in its class certification order, created two subclasses of Plaintiffs. These subclasses are complementary. Each member of the class is in exactly one of the subclasses since each class member either "paid any portion of the statutory service charge," or did not. (Certification Order, p. 14.)

The Court certified under 23(b)(2) issues of liability, declaratory relief, and statutory damages for those who did not pay any service charge. The Court certified under Rule 23(b)(3) issues of actual damages for those that paid any portion of the service charge. Plaintiffs do not want to change the extent of the class overall, but rather move for a modification of the allocation of class members between subclasses. This allocation implicates the

procedures for treating the subclasses.

Rule 23(b)(2) is appropriate when "the party opposing the class has acted ... on grounds generally applicable to the class, thereby making appropriate final injunctive relief or *corresponding declaratory relief* with respect to the class as a whole." Fed. R.Civ.P. 23(b)(2)(emphasis added). A Rule 23(b)(2) class action seeks to secure remedies "with respect to the class as a whole." the rule mentions both "injunctive relief or corresponding declaratory relief." *Id.* However, class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive and declaratory relief; these cases may

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3. More specifically, FDCPA class actions certified under Rule 23(b)(2) are also not limited to actions requesting injunctive and declaratory relief. *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 596-97 (E.D. Cal. 1999)(certifying FDCPA class under Rule 23(b)(2) on the issues of liability, declaratory relief, and statutory damages but reserving certification of actual damages for certification under Rule 23(b)(3)); *Gonsalves v. Arrow Fin. Services, L.L.C.*, (S.D. Cal. 2006)(certifying FDCPA class under Rule 23(b)(2) where plaintiffs received standardized demand letters and sought declaratory relief and statutory damages; *Borcherding-Dittloff v. Transworld Sys., Inc.*, 185 F.R.D. 558, 565-66 (certifying class under Rule 23(b)(2) for claims under FDCPA where plaintiffs sought declaratory relief and statutory damages); *Gammon v. GC Services Ltd. P'ship*, 162 F.R.D. 313, 319-22 (1995)(certifying class under Rule 23(b)(2) for claims under FDCPA seeking declaratory relief and statutory damages); *Swanson v. Mid Am, Inc.*, 186 F.R.D. 665 (M.D. Fla. 1999)(same).

also seek monetary damages where the money damages are "merely incidental". *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir. 1986), Cert. Denied, 476 U.S. 1170 (1986). "Incidental" means that the monetary damages "flow directly from liability to the class as a whole on the claims forming the basis of the ...declaratory relief." *Swanson v. Mid am, Inc.*, 186 F.R.D. 665 (M.D. Fla 1999)(citing *Alison v. Citgo Petroleum Corp.*, 151 F. 3d 402, 413, (5th Cir. 1998) FN3. The focus on a remedy that imposes liability on defendant for conduct generally applicable to the class makes the offer to class members of the opportunity to opt out of the lawsuit inappropriate. This lack of opt-out opportunity prevents a class member from opting out and bringing a separate lawsuit for declaratory judgment, whose result would either be redundant or contradictory. Additionally, the FRCP makes direction of notice in a 23(b)(2) class discretionary. Fed.R.Civ.P. 23(c)(2)(A).

In class action suits where damages predominate, on the other hand, courts certify the class under Rule 23(b)(3). *See* Fed.R.Civ.P. 23(b). When a court certifies a class or subclass under this section, it *must* direct notice of the action, including the opportunity to class members. Fed.R.Civ.P. 23(c)(2)(B).

Plaintiff urges the Court to modify the class certification order to avoid overbreadth in the definition of the subclass certified under Rule 23(b)(3). Because the Court must direct notice to each member of this subclass, including an offer to opt-out, overbreadth would lead to the unnecessary cost of sending notice to "thousands of check writers who are not entitled to actual damages."(Modification Motion at p.4.) Only those class members who

suffered actual damages should receive notice or the opportunity to opt out.

After an analysis of legislature history, this Court found that the FDCPA is a "mandatory recovery scheme that does not provide for additional collection of *interest*." (Summary Judgment Order, p. 14.)(emphasis added.) The statutory charge, on the other hand, is not wrongful. *Id.*, In fact, imposition of a statutory fee is part of the "mandatory and exclusive" scheme that the legislature intended for recovery by bad debt collectors. *Id.* Every member of the class received Defendant's demand for interest payments in addition to statutory charges. However, only those Plaintiffs who paid any part of the demanded interest suffered actual damages as a result of Defendant's actions. Many of the class members who paid any portion of the *penalty* (who currently comprise the 23(b)(3) subclass) did not pay any portion of the demanded interest. FN4. Those who did not pay interest did not suffer actual damages.

B. APPROVAL OF CLASS NOTICE PLAN

1. BEST NOTICE PRACTICABLE

Plaintiffs propose sending notice to class

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4. Defendant only sought payment of: (1) the face amount of the check; (2) a statutory service charge; and (3) interest. Plaintiffs consider interest to be any amount of a class member's payment to Defendant that exceeds the check amount plus the service charge. (Memo. In Sup. Of Motion to Modify, p. 5, n.2.) Under this calculation method, the group of class members that paid any interest will necessarily be smaller than the group that paid any penalty.

members by first-class mail. Determining the scope of "best notice practicable" is a fact-intensive inquiry. *In re Simon II Litigation*, 211 F.R.D. 86, 183 (E.D.N.Y. 2002). Delivery by first-class mail can satisfy the best notice practicable when there is no indication that any of the class members cannot be identified through reasonable efforts. *See Bourias V. Davis Law Associates*, 237 F.R.D. 345, 356 (E.D.N.Y. 2006)(Delivery by first class mail to each individual class member satisfies Rule 32(c)(2)(b) when no indication that any of the class members cannot be identified through reasonable efforts.) The use of first-class mail is particularly appropriate for two reasons. First, the letters which give rise to the action reached class members through the mail. Second, membership in the class is predicated on the successful receipt of mail; only those people "whose mail was not returned as undeliverable" are part of the certified class. Delivery by first class mail satisfies the requirement for best notice practicable.

Having determined the mode of transmission, the court next turns to the form of the notice. Plaintiffs submitted, with their motion for approval of class notice, a proposed form of notice. The purpose of the mandatory notice requirement in 23(b)(3) actions is to present a fair recital of the subject matter of the suit and to inform all class members of their opportunity to be heard. *In Re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125 (9th Cir. 1977)(citations omitted). The Court examines plaintiff's proposed notice for compliance with Rule 23(c)(2)(b) and for its protection of the due process interests of absent class members.

Plaintiffs' proposed notice includes a summary of the action, the plaintiffs, defendant, subject of the suit and a definition of the class certified. The notice

lays out Plaintiffs' claim and informs class members of their right to opt out of the suit, the ability to obtain separate representation, and some of the reasons to opt out of the suit. The language in the notice informs recipients that "[a]ll rulings made by the court will apply" to them and that they will share in any settlement. Accordingly, the operative language of the proposed notice satisfies Rule 23(c)(2)(b)'s elements and uses the necessary "plain, easily understood" language. The notice overall is clear and concise. FN5

The court approves plaintiffs' notice to 23(b)(3) subclass members.

2. Cost of notice

The court now turns to the allocation of the cost of providing notice to the class. According to defendant's data, 22,341 people paid interest in response to demand letters in the class time period. At $1 per person, the cost of providing notice would be $22,341. While this amount is less than 10% of the total interest payments that Defendant processed, it is not a trivial amount for either party.

Class representatives must be prepared, at the outset of the suit, to accept the responsibility of identifying absentee class members and paying for their individual notice. *See Eisen v. Carlisle & Jacqueline*, 417 U.S. at 156, 176-79 (1974). This general rule that imposes cost of notice on the party seeking to maintain a class action can give way in "peculiar circumstances." *In Re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977). At the end of the case, of course, the district

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5. The final notice should contain real contact information for class counsel instead of the placeholder present in the exhibit.

court can allocate the cost of identifying and giving notice to class members "as it would any other item of costs." *Id.*

In *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969), the district court dealt with how to allocate the cost notice to the class. In that case, a consolidation of stockholders' actions based on fraud in the purchase of securities, the court noted that "no rigid rule as to allocation of expense of notice is advisable and that the better course is to decide the issue in each case on the basis of the relevant factors." *Id.* At 132. These factors include the merit of the claim and the defendant's desire to take advantage of the *res judicata* effect of the class action. *Id.* In addition, the *Berland* court considers the number of named plaintiffs and their financial responsibility, their interests compared with the entire class, and their ability to pay considering the cost of the notice. *Id.* Because factual underpinning of the present case differs from *Berland*, not all of the factor are applicable. Nevertheless, the *Berland* analysis provides a framework for the analysis here. The court now turns to the relevant *Berland* factors.

Under *Berland*, the strength of the class action claim is a factor for deciding which party pays the cost of the notice. When evaluating the strength of plaintiff's case on the merits, this court need not resort to a preliminary hearing or examine the apparent merit in the claim. *See Eisen* (rejecting the use of a preliminary hearing for determining which party should pay the cost of directing notice). Instead, the court refers to its March 20, 2007 Summary Judgment Order. In that order, the Court found that "as a matter of law ... Defendant's collection letters violated the FDCPA" and granted Plaintiff's Motion for Summary Judgment as to

Defendant's liability. (Summary Judgment Order, p. 17.) several district courts have shifted the cost of notice to the defendant after a finding of liability. *See Meadows v. Ford Motor Co.*, 62 F.R.D. 98 (W.D.Ky. 19873)(Imposing the expense of notice on defendant after determining that the plaintiff and the class were entitled to recover on their demands for injunctive relief); *Catlett v. Mo. Hwy. and Transp. Comm'n*, 589 F. Supp. 949 (W.D.Miss. 1984)(Ordering defendant to bear expense of notice because the liability had been established and because cost involved was substantial); *Kriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 144 (D.M.J. 1979)(After a finding of liability, writing, "all costs of notification are, of course, to be borne by [defendant]"). In addition, a district court recently required a defendant to bear the cost of notice based on the *likelihood* that summary judgment would be entered against the defendant. *See Fournigault v. Independence One Mortg. Corp*, 2007 WL 1492848 (N.D. Ill. 2007). While defendant devotes considerable effort to distinguish the case law, the court does not find its arguments persuasive.

First, Defendant relies on *Eisen* for the proposition that "the costs of notice [must] be paid by plaintiff" and that the Supreme Court "made no exception to this rule if liability was established." (Def.'s Opp to Notice Motion, p.5.) This reading overstates the Supreme Court's holding. The district order in that case that imposed costs on defendant followed a "preliminary hearing." *Eisen*, 417 U.S. at 177. The court rejected the propriety of such a hearing, writing that not only was there "nothing in either the language or history of Rule 23 that gives a court any authority" to conduct such an inquiry, but that "such a procedure contravenes the Rule." *Id.* The

Court criticized the fact that a preliminary hearing allowed a plaintiff "to secure the benefits of a class action without first satisfying the requirements for it." *Id.* In addition, such a procedure creates the risk of "substantial prejudice to a defendant" of holding a hearing without "the traditional rules and procedures available to civil trials." *Id.* At 177-178. As noted above, the grounds on which the court rejected the order are not present in the current case; summary judgment is authorized by Rule 56 and inflicts no prejudice on a defendant.

Second, Defendant argues that the "liability in this case is not yet established and will not be established until the Court of Appeals for the Ninth Circuit established binding precedent" on the statutory interpretation of the FDCPA. (Def's Opp. To Notice Motion, p. 1.) On the contrary, Rule 56 empowers this Court to grant summary judgment when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In addition a summary judgment "may be rendered on the issue of liability." *Id.* In the absence of precedent from the Ninth Circuit, the Court reached its conclusion in granting partial summary judgment by examining two district court cases from this district and undertaking extensive analysis of the legislative history of the FDCPA. The Court's Summary Judgment Order establishes Defendant's liability.

Third, Defendant claims the standard of appellate review for a question of law renders the Court's conclusions uncertain. The findings of liability in *Kyriazi* and *Meadows* that preceded the order that defendant's pay notice costs were based on factual findings that the defendants' conduct violated the law. Such findings receive appellate review under

an abuse of discretion standard, and, as defendant correctly states, the Ninth Circuit would review *de novo* the court's finding of defendant's liability as a matter of law. However, while the standard of appellate review may influence defendant's chances of success on appeal, it does not undermine the finality of this court's summary judgment. FN6

Because the Court has issued a final ruling finding Defendant liable, Plaintiffs will prevail on their claims. Accordingly, this factor weighs in favor of Defendant bearing the cost of the notice.

Having shown the certainty of Plaintiffs' success on the merits, the Court now turns to the other *Berland* factors: the Defendant's desire to take advantage of the *res judicata* effect of the class action, the number of named plaintiffs and their financial responsibility, the named plaintiffs' interests compared with the entire class, and their ability to pay considering the cost of the notice. On the current record, the court cannot determine the extent of Defendant's desire to take advantage of the res judicata effect of the class action. The other *Berland* factors support an order that Defendant pay for the cost of notice. The named Plaintiffs received demands for total interest payments of $37.69. (Summary judgment order, at p.3.) This amount constitutes only a fraction of the over $260,374.76 that Defendant

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6. In fact, this court has already expressed confidence in its ruling. In denying defendant's motion for certification for immediate appeal of the issue of liability under the FDCPA, the court wrote that "there is no substantial ground for difference of opinion." (Summary judgment order, p. 18.)

characterizes as interest. The Plaintiffs have a small absolute stake in the class action, and their claims are minuscule compared with the cumulative claims of the class. The overall estimated cost of notice is a substantial $22,341. Therefore, ordering Plaintiffs to pay the cost of notice on Plaintiffs would impose a burden out of proportion to their personal stakes in the lawsuit. These factors, while not dispositive, support a decision to order Defendant to bear the cost of sending notice to class members.

The *Berland* factors weigh in favor of Defendant bearing the costs, and the Court has already made a final decision on the merits of Plaintiffs' claim. It would be unreasonable to order Plaintiffs to pay the cost of notice when the Court has already found Defendant liable. FN7

CONCLUSION

Because the current class certification is overbroad in its allocation of class members into the 123(b)(3) subclass, the court modifies the class certification as follows:

1. Named plaintiffs Castillo and Hunt are **certified** as the representatives of the class defined as follows: all persons to whom Defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge on a dishonored check; (2) where the check was written in the State of California for personal, family, or household

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7. Defendant argues that it is unable to pay the notice costs and that the court should therefore refrain from imposing costs. Defendant's ability to pay is not a relevant factor in deciding the motions before the court.

purposes; and (3) whose mail was not returned as undeliverable. FN8

2. It is **further ordered** that the issues of liability, declaratory relief, and statutory damages under the FDCPA for those class members who did not pay any portion of the *interest* demanded is **certified** under Rule 23(b)(2).

3. It is **further ordered** that the issues of actual damages under the FDCPA for those class members who paid any portion of the *interest* demanded is **certified** under rule 23(b)(3).

The court **orders** Plaintiffs to send notice, by first class mail, to all class members who paid any portion of the demanded interest. The language in the notice must conform to that in the exhibit that Plaintiffs submitted with their motion. The Court **orders** Plaintiff to account for the actual cost of producing and sending the notices, and the court **orders** Defendant to pay the cost of producing and sending the notices.

It is so ordered.

Dated: July 25, 2007

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

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8. This certification of the class as a whole is unchanged.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

HUNT,

PLAINTIFF,

V.

CHECK RECOVERY SYSTEMS, INC.,

DEFENDANT.
_____/

NO. C05-04993 MJJ
NO. C06-02037 MJJ

ORDER GRANTING PLAINTIFF'S MOTION TO CERTIFY CLASS

INTRODUCTION

Before the Court is Plaintiff's Brandy Hunt ("Hunt") and Brian Castillo's (Castillo")(collectively, "Plaintiffs") Motion to Certify Class. FN1 Defendant Imperial Merchant Services d.b.a. Check Recovery Systems ("Defendant" or "Imperial") opposes the motion. For the following reasons, the Court **grants** Plaintiffs' Motion to Certify Class.

FACTUAL BACKGROUND

A. PROCEDURAL HISTORY

Hunt and Castillo filed their complaints on December 5, 2005 and March 16, 2006, respectively. On May 9, 2006, this Court issued a related case

1. Docket no. 45, filed September 19, 2006

Order relating Plaintiff's cases. Both Plaintiff's seek damages under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. Seq.* ("FDCPA"). Plaintiffs allege that Imperial's practice of including an interest charge, in addition to their attempt to collect both a check amount and a statutory service charge violates the FDCPA. In particular, Plaintiffs allege that Defendant's debt collection practices: (1) use false, deceptive or misleading representations in violation of § 1692e; (2) falsely represent the character, amount, or legal status of the debt in violation of § 1692e(2)(a); (3) use unfair or unconscionable means to collect or attempt to collect the debt in violation of §1692f; and (4) exceed the amount expressly permitted by law in violation of §1692f(1). Plaintiff's now seek class certification, to create a class of similarly situated Plaintiffs, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b).

On behalf of the class, Plaintiffs seek the following forms of relief: (1) declaratory judgment that Defendant's practices violate the FDCPA; (2) actual damages pursuant to §1692k; (3) statutory damages pursuant to §1692k; and (4) costs and reasonable attorney fees pursuant to §1692k.

B. The Parties

On July 5, 2004, Hunt wrote a check in the amount of $137.15 to Pack 'n Save. (Joint statement of Undisputed Fact ("JSUF") ¶2.) On November 28, 2004, Castillo wrote a check in the amount of $276.36 to Pak 'n Save. (*Id.* ¶1.) Both checks were written for personal, family, or household purposes, and both checks returned unpaid due to insufficient funds. (*Id.* ¶¶1-2, 5.) Pak 'n Save is operated by Safeway, Inc. ("Safeway"). (*Id.* ¶3.) After the Castillo and Hunt checks were returned unpaid, Safeway referred the

checks to Imperial for collection. (*Id.* ¶4.) The parties agree that Imperial's debt collection conduct is governed by the FDCPA. (*Id.* ¶5.)

C. Defendant's Debt Collection Practices

The principal purpose of Imperial is to collect debts. (*Id.* ¶5.) When Safeway refers unpaid checks written in California to Imperial, Safeway asks Imperial to collect the check amount and the service charge provided under California Civil Code §1719. (*Id.* ¶6.) Imperial retains 27% of the amount collected for the check and the statutory service charge. (*Id.*) Imperial retains 100% of the interest that it collects.(*id.*) Safeway and Imperial followed these practices in connection with the Hunt and Castillo checks (*id.*)

1. CASTILLO'S CHECK

Safeway referred the Castillo check to Imperial to collect the check amount plus a $25.00 statutory service charge. (*id.* ¶7.) Imperial mailed Castillo a collection letter, dated March 17, 2005 in which Imperial demanded $276.36 for the check amount, $25.00 as a "Misc." charge, and $8.99 as interest. (*Id.*) Subsequently, Imperial mailed Castillo a collection letter, dated December 2, 2005, in which Imperial demanded $276.36 for the check amount, 425.00 as a "Misc." charge, and $30.43 as interest. (*Id.*)

2. HUNT'S CHECK

Safeway referred the Hunt check to Imperial to collect the check amount plus a $35.00 statutory service charge. (*Id.* ¶8.) Subsequently, Imperial mailed Hunt two collection demands. (*Id.*) The second demand, dated December 6, 2005, includes a demand for the check amount, a "Misc." charge of $35.00, and interest of $67.26, for a total of $179.41.

D. PROPOSED DEFINITION OF THE CLASS

Plaintiffs define the proposed class as follows:

> All persons to whom defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge on as dishonored check; (2) where the check was written in the State of California for personal, family or household purposes; and (3) whose mail was not returned as undeliverable.

(Plaintiffs' Motion for Class Certification ("Mot. For Cert.")2.)

LEGAL STANDARD

Rule 23 of the Federal Rules of Civil Procedure outlines a two-step process for determining whether class certification is appropriate. First, Rule 23(a) sets forth four conjunctive prerequisites that must be met for any class:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a); *see also Hanon v. Data Products Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). These four requirements are often referred to as numerosity, commonality, typicality, and adequacy. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982); *In Re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 153 (N.D. Cal. 1991).

Second, assuming the requirements of

subdivision (a) are satisfied, the party seeking class certification must also demonstrate that the action is maintainable by falling within one of the three kinds of actions permitted under Rule 32(b). *See* Fed.R.Civ.P. 23(b); *In Re Adobe Sys.*, 139 F.R.D. at 153. Specifically, the Plaintiffs must demonstrate their claim is proper under Rule 23(b)(1), (b)(2), or (b)(3).

An action is maintainable under Rule 23(b)(1) when there is either "a risk of prejudice from separate actions establishing incompatible standards of conduct" or the judgment in an individual lawsuit might adversely impact other class members. *See generally* Hon. William W. Schwarzer, *Federal Civil Procedure Before Trial* §10.385 (2006). This particular type of class action does not permit the recovery of damages. *See Alpert v. U. S. Industries, Inc.*, 59 F.R.D. 491, 499 (C.D. Cal. 1973).

An action is maintainable under Rule 23(b)(2) if the defendant "has acted (or refused to act) in a manner applicable to the class generally, thereby making injunctive or declaratory relief appropriate with respect to the class as a whole." Schwarzer, *supra*, §10.298-406. Rule 23(b)(2) actions are common where injunctive or declaratory relief is the primary relief sought on behalf of the class. *See Id.* Recovery of damages is generally not available in a Rule 23(b)(2) class action. *See Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003). The Ninth Circuit has required a careful consideration of the facts of each case to ensure that a class certified under Rule 23(b)(2) is primarily seeking injunctive relief. *See id.*

Finally, an action is proper under Rule 23(b)(3) if questions of law or fact common to the class "predominate" over questions affecting the individual members, and the court determines that a class

action is superior to other methods available for adjudicating the controversy. *See* Fed.R.Civ.P. 23(b)(3). Recovery of damages is available under Rule 23(b)(3). *See* Schwarzer, *supra*, §10:420-479. If a class is certified under Rule 23(b)(3), all absent class members must be notified of the action and informed of their right to "opt-out" of the litigation. *Id.*

In analyzing whether the putative class meets the requirements of Rule 23, a court is to take the substantive allegations of the complaint as true, and may also consider extrinsic evidence submitted by the parties. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Moreover, "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178 (1974)(quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir 1971)). Nevertheless, the plaintiffs bear the burden of establishing each of the required elements for class certification. *See id.* At 617 (citing *In re Northern Dist. Of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2D 847, 854 (9th Cir. 1982)).

ANALYSIS

I. Prerequisites of Rule 23(a)

As a preliminary matter, Defendant argues that Plaintiffs lack standing to bring this class action. Specifically, Defendant purports that Hunt and Castillo have discharged their debt to Defendants in a prior bankruptcy proceeding and, thus, Plaintiffs sustained no injury from Defendant's alleged unlawful acts.

The Court finds this argument unavailing. The conduct being litigated here is in the alleged unlawful collection of interest by Defendant from

Plaintiffs, and others similarly situated. In other words, the injury occurred upon Defendant's demand for interest on the dishonored checks. Plaintiff's ability to sue Defendant for unlawful collection of interest under the FDCPA does not rest on Plaintiffs actually incurring debt as a result of Defendant's conduct. "The [FDCPA] is designed to protect consumers from the abusive, deceptive and unfair debt collection practices of unscrupulous debt collectors, regardless of whether a valid debt actually exists." *Borcherding-Dittloff v. Transworld "Sys., Inc.*, 185 F.R.D. 558, 564, (W.D. Wis 1999)(citing *Baker v. G.C. Serv. Corp.*, 677 F2d 775, 777 (9th Cir. 1982)). Therefore, Plaintiffs have standing to sue and the Court will now determine if class certification is appropriate. FN2

A. NUMEROSITY

Plaintiffs assert that the class is sufficiently numerous because Defendant mailed out thousands of collection letters demanding both interest and a statutory fee. Defendant conditionally concedes the

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2. Defendant admits that Plaintiffs meet all prerequisites of Rule 23(a) in the event that this Court finds that Plaintiffs have standing to bring this action. (*See* Dec. Of Arons, Ex. 2.) The Court finds that Plaintiffs do have standing, creating a situation where class certification pursuant to Rule 23(a) is essentially unopposed. However, in the interest of justice, the Court will review all the necessary requirements under Rule 23 to ensure that class certification is appropriate. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)(stating that a class may only be certified if the court is "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.")

issue of numerosity based on the Court's finding that Plaintiffs have standing to sue.

Under Rule 23(a), the class must be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). However, there must be a "statement of basic facts. Mere repetition of the language of the Rule is inadequate. *Gillibeau v. Richmond*, 417 F.2d 416, 432 (9th Cir. 1969).

Here, Plaintiffs make a "statement of basic facts" and show that the class is sufficiently numerous. Plaintiffs allege that Defendants mailed 67,108 collection letters for 43,536 checks referred to Defendants between November 2004 and May 2006. Plaintiffs' allegations show that the potential class is "so numerous that joinder of all members is impracticable."

B. Commonality

Plaintiffs rely on the fact that Defendant mailed form collection letters demanding interest. Defendant does not contest the mailing or contents of the collection letters.

"A class has sufficient commonality 'if there are questions of fact and law which are common to the class'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir., 1988)(quoting Fed.R.Civ.P. 23(a)(2)). The Northern District has interpreted that to mean that commonality typically manifests "where... the defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters." *Palmer v. Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006)(quoting *Keele v. Wexler*, 149 F.3d 4589,594 (7th Cir,. 1988)).

Here, Defendant allegedly committed the same

"standardized conduct found in *Palmer*. Defendant allegedly sent out form letters demanding Plaintiffs to pay statutory fees for dishonored checks as well as interest on the owed money. Defendants targeted this conduct to all Plaintiffs in the putative class, in the same manner. Based on Defendant's alleged standardized conduct, this Court concludes that common questions of law exist as to whether Defendant's conduct was unlawful.

C. Typicality

For Typicality, Plaintiffs rely on a similar argument as they did for commonality. Specifically, that typical claims amongst all potential class members exist because Defendant sent unlawful form collection letters to Plaintiffs.

The typicality requirement serves to "assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Typicality refers to the nature of the claim or defense of the class representative and not on facts surrounding the claim or defense. *Id.* The burden imposed by the typicality requirement is not great. *See Hanlon*, 150 F.3d at 1020. In fact, the Ninth Circuit has noted that "the commonality and typicality requirements of Rule 23(a) tend to merge." *Staton*, 327 F.3d at 957. [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Keele*, 149 F.3d at 595 (internal citations omitted).

Here, Plaintiffs share one legal theory with the rest of the class. Plaintiffs are suing Defendant under the FDCPA, alleging that defendant engaged in unlawful standardized conduct towards Plaintiffs.

Defendant's argument that Plaintiffs are only typical of a putative class that "have written dishonored check[s], paid no interest, and then discharged their debt in bankruptcy" is not only incorrect, but immaterial for atypicality analysis. (Defendant's Motion in Opposition to Plaintiff's Motion for Class Certification, 11:21-23.) "Typicality refers to the nature of the claim or defense of the class representative, and not the specific facts from which it arose or the relief sought. *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 545 (N.D. CAL. 2005)(quoting *Hanon*, 976 F.2d at 508.) Factual variations among class members' grievances do not defeat a class action. *Keele,* 149 F.3d at 594 (citing *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980)); *see also Irwin v. Mascott*, 96 F. Supp. 2d 968, 977 (N.D.Cal. 1999)(stating the fact that named plaintiffs may have a right to statutory damages, injunctive relief and declaratory relief, but not a right to actual damages, does not render their clams atypical). Accordingly, the typicality requirement is satisfied.

D. Adequacy

Plaintiffs rely on their declarations, and those of their counsel, to satisfy the adequacy requirement. Plaintiffs allege no potential conflict of interest between them and the rest of the proposed class. Defendant contends that there is a conflict of interest between the Plaintiffs and the putative class because Plaintiffs discharged their debts in previous bankruptcy proceedings.

The Federal Rules require that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This requires the Court to ask two questions:"(1) Do the representative plaintiffs and

their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton*, 327 F.3d at 957; *see also* Fed.R.Civ.P. 23(g)(1)(B)(stating that "class counsel must fairly and adequately represent the interests of the class.").

Here, Defendant argues that since Plaintiffs discharged their debts to Defendant through bankruptcy proceedings, Plaintiffs have a conflict of interest with respect to the rest of the class. The Court finds this argument unconvincing. Discharging one's debt may ultimately effect the collection of damages, but it does not conflict with the legal merits of the claim with respect to class members who did not discharge their debt. Based on the record before the Court, the only conflict between Plaintiffs and any potential class member could be a difference in the amount of recovery. FN3 However, a potential difference in recovery does not, in itself, create a conflict of interest. *See, e.g. Palmer*, 233 F.R.D. at

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3. Named plaintiffs in FDCPA class actions would be entitled to up to $1,000 in statutory damages. 15 U.S.C §1692k(a)(2)(B)(i). Unnamed class members would be entitled to share statutory damages of up to 1 percent of Defendant's net worth. 15 U.S.C. §1692K(a)(2)B)(ii). Each class member would be entitled to any actual damages. 15 U.S.C. §1692k(a)(1).

551. Additionally, any financial incentive in Plaintiffs or class counsel will likely lead them to "prosecute the action vigorously." FN4

Accordingly, Plaintiffs and their counsel have no conflict with potential class members and Plaintiffs' counsel has extensive experience in FDCPA class actions. Notwithstanding Defendant's concern with Plaintiffs' bankruptcy status, Plaintiffs satisfy the adequacy requirements.

II. Whether Certification is Appropriate Under Rule 23(b)(2) or Rule 23(b)(3)

To be certified, a class must also satisfy the criteria of one of the three subsections of Rule 23(b). Plaintiffs request class certification pursuant to Rule 23(b)(2), or in the alternative, a hybrid class pursuant to Rule 23(b)(2) and (3). Defendant argues that certification under Rule 23(b)(2) would be improper by arguing that the FDCPA does not allow a private plaintiff to obtain equitable relief. Defendant argues that certification under Rule 23(b)(3) would be improper because common questions of law and fact do not predominate and because a class action is not superior to alternative methods of adjudication of the controversy. As fully explained below, the Court finds that certification under Rule 23(b)(2) is appropriate on the issues of liability, declaratory relief, and statutory damages, and that certification under Rule 23(b)(3) is appropriate on the issue of actual damages.

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4. Plaintiffs Counsel, Arons, Wilcox, and Bragg have been involved in many FDCPA class actions in this District and in other courts. *See generally Palmer*, 233 F.R.D. 546 (N.D.Cal. 2006); *Schwarm v. Craighead*, 233 F.R.D. 655 (E.D. Cal. 2006); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D.CAL. 1999).

A. Rule 23(b)(2)

Plaintiff's primary request is for the entire class to be certified pursuant to Rule 23(b)(2). Defendant argues that certification on these grounds is improper because Plaintiffs' claims for declaratory and injunctive relief are not available under the FDCPA and not appropriate for class certification under Rule 23(b)(2).

A class may be certified under Rule 23(B)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Rule 23(b)(2) generally does not extend to cases in which the appropriate final relief relates primarily to money damages. *See Arnold v. United Artists Theatre Circuit, Inc.*, 148 F.R.D. 439, 450-51 (N.D. Cal. 1994)(citing Rules Advisory Committee Notes to 1966 Amendments to Rule 23, reprinted at 39 F.R.D. 69, 102 (1966)); *see also Molski*, 318 F.3d at 949-50. The Ninth Circuit has required a careful consideration of the facts of each case to ensure that a class certified under rule 23(b)(2) is primarily seeking injunctive relief. *See id.*

However, class actions certified under Rule 23(b)(2) are not limited to actions requesting injunctive and declaratory relief, but may include cases that also seek monetary damages where the money damages are "merely incidental." *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir. 1986), *cert. denied*, 476 U.S. 1170 (1986). "Incidental" means that the monetary damages "flow directly from liability to the class as a whole on the claims forming the basis of the .. declaratory relief." *Swanson v. Mid Am, Inc.*, 186 F.R.D. 665 (M.D. Fla.

1999)(citing *Alison v. Citgo Petroleum Corp.*, 151 F. 3d 402, 413 (5th Cir. 1998). More specifically, FDCPA class actions certified under Rule 23(b)(2) are also not limited to actions requesting injunctive and declaratory relief. *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 596-97 (E.D. Cal.1999) (certifying FDCPA class under Rule 23(b)(2) on the issues of liability, declaratory relief, and statutory damages but reserving certification of actual damages for certification under Rule 23(b)(3)); *Gonzales v. Arrow Fin. Services, LLC*, 233 F.R.D. 577 (S.D. Cal. 2006)(certifying FDCPA class under Rule 23(b)(2) where plaintiffs received standardized demand letters and sought declaratory relief and statutory damages); *Borcherding-Dittloff*, 185 F.R.D. at 565-66 (certifying class under Rule 23(b)(2) for claims under FDCPA where plaintiffs sought declaratory relief and statutory damages); *Gammon v. GC Services Ltd. P'ship*, 162 F.R.D. 313, 319-22 (1995)(certifying class under Rule 23(b)(2) for claims under FDCPA seeking declaratory relief and statutory damages); *Swanson v. mid Am, Inc.*, 186 F.R.D. 665 (M.D. Fla. 1990)(same).

Here, Plaintiffs' request for statutory damages is secondary to their primary claim of declaratory relief for three reasons. First, the declaratory relief requested will affect more persons and have consequences over a greater period of time than monetary damages. *See Ballard*, 186 F.R.D. at 596. These claims will affect not only those class members who received Defendant's demand letters who may be entitled to statutory damages, but also those class members who received the demand letters and then subsequently incurred additional actual

damages FN5 by paying the alleged illegally demanded amounts. The principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and setting of legal relations between the parties, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Gammon*, 162 F.R.D. at 320; *see also Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986); Schwarzer, *supra* at ¶10:5. In the instant case, a declaratory judgment would settle the issue of the legality of Defendant's behavior with respect to the entire class. Given that the very purpose of class actions is to promote judicial efficiency and economy, the Court finds that Plaintiff's request for declaratory judgment to be appropriate. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 149 (1982).

Second, the Court notes that Plaintiffs' money damages, and those of the putative class, all flow directly from demand letters sent by Defendant and are therefore secondary to the claim for declaratory relief. *See, e.g. Borcherding-Dittloff*, 185 F.R.D. at 566 (stating "[c]ourts have found requests for declaratory relief to predominate over requests for monetary relief where the award of damages flows directly from the declaratory relief and where damages are easily calculated by a formula that is uniformly applicable to the class")(citing *Rice v. City of Philadelphia*, 66 F.R.D. 17, 20 (E.D. Pa. 1974)). Here, because Plaintiffs request statutory damages and declaratory relief arise from Defendant's

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5. The inquiry regarding actual damages is more appropriate as a class under Rule 23(b)(3) as discussed below.

repeated violation of the FDCPA, the resulting statutory damages flow directly from Defendant's underlying FDCPA liability. The calculation of statutory damages will be a mechanical task and is therefore readily calculable for the entire class. *See* 15 U.S.C ¶1692k(a)(2)(B).

Third, the statutory damages for each class member is comparatively nominal. As the court noted in *Gammon*, because the FDCPA caps the maximum award at $500,000 or 1 percent of the of the net worth of the debt collector, each class member would receive a nominal amount. *See Gammon*, 162 F.R.D. at 320. As a result, the court concluded that the plaintiff's request for declaratory relief predominated over the request for monetary relief. *See id.* Similarly, the proposed class here results from 67,108 demand letters between November, 2004 and May 2006 based on a total of 43,536 checks referred. Since Defendant's net worth is approximately $456,151, FN6 the maximum amount of recovery for each class member would approximately be between 7 cents and 10 cents. The Court find this amount to be de minimus and not sufficient to sustain Defendant's arguments that Rule 23(b)(2) certification is inappropriate.

B. Rule 23(b)(3)

In the event that this court does not certify the entire class under Rule 23(b)(2), Plaintiffs alternatively seek to certify the issue of actual

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6. Defendant states that its net worth has not yet been established. However, Defendant's balance sheet on its Federal 1120S Income Tax Return, provided in discovery, shows a net worth of 4456,151.00. (Defendant's Motion in Opposition to Plaintiff's Motion for Class Certification, 16:1-4.)

damages pursuant to Rule 23(b)(3). Defendant relies on the *Palmer* case, 233 F.R.D. 546, and argues that common questions of law and fact do not predominate, and that a class action is not superior to alternative methods of adjudication of the controversy.

Class certification pursuant to Rule 23(b)(3) requires a determination that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). The Court now turns to the issues of predominance and superiority.

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon*, 150 F.3d at 1022 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)). "Rule 23(b)(3) focuses on the relationship between the common and individual issues. 'When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.'" *Id.* (quoting 7A Charles Alan Wright, *et. al., Federal Practice & Procedure* ¶1778 (2d ed. 1986)). The primary and predominating question in this case is whether Defendant's conduct in demanding statutory changes, in addition to the debt amount and interest, was contrary to California law and therefore in violation of the FDCPA. As to actual damages, the question will be how much

actual damage was sustained by each class member. 15 U.S.C. 1692k(a)(1).

Here, the legal issues arising from Defendant's demand letters are the same for each class member. As Plaintiffs correctly point out, the only individual issues are ministerial, *e.g.* identifying class members and calculating actual damages. Plaintiffs explain that the calculation of actual damages will require individualized issues of proof, because the amounts collected will be reflected in Defendant's collection records. Defendant does not substantively respond to Plaintiff's arguments on predominance and does not present availing arguments regarding any individualized issues. As a result, the Court finds that the predominant common questions in this case present a clear justification for handling the dispute on a representative rather than on an individualized basis.

2. Superiority

Plaintiffs argue that a class action is superior in this context because putative class members would not ordinarily file individualized actions. In particular, Plaintiffs contend that most putative class members would not be aware of their rights and would not have the time and resources to locate knowledgeable counsel willing to represent them. Defendant counters that an individualized action, seeking $1,000 in statutory damages, accompanied by a claim under ¶17200 of the California Business and Professions Code for disgorgement of profits is the superior method of adjudicating this case.

In determining superiority of a class action to individual litigation, courts consider the interests of the individual members in controlling their own litigation, the desirability of concentrating the litigation in the particular forum, and the

manageability of the class action. Fed.R.Civ.P. 23(b)(3); *see also Amchem Prods., Inc.*, 521 U.S. at 615. In determining whether a class action may be superior to individual litigation, the Court notes that the FDCPA specifically provides for and contemplates class action relief. 15 U.S.C. §§1692k(a)(2)(B), (b)(2). Courts have found that individual consumers are most likely unaware of their rights under the FDCPA. *Ballard*, 186 F.R.D. at 600. Moreover, class action certifications to enforce compliance with consumer protection laws are desirable and should be encouraged." *Id.* (citing *Duran v. Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607, 610 (D. Ariz. 1982) (citing *Watkins v. Simmons and Clark, Inc.*, 618 F.2d 398, 404 (6th Cir. 1980))).

Here, the Court finds that a class action in this context is superior to individual claims. First, the Court agrees that individual consumers are most likely unaware of their rights under the FDCPA and that the likelihood of individual actions is remote. *See Ballard*, 186 F.R.D. at 600. Second, the drafters of the FDCPA contemplated class action recovery within the liability portion of the act. Third, the size of any individual damages claims under the FDCPA are usually so small that there is little incentive to sue individually. *See id.* (citing *Amchem Prods., Inc.*, 521 U.S. At 615). Fourth, efficiency and consistency of concerns favor litigating the legality of Defendant's standardized conduct by all class members in one suit, rather than forcing each class member to sue individually. *Id.* (citing *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 188-89 (N.D. Ill. 1992)). Finally, as was the case in *Ballard*, while valid concerns regarding the manageability of the class exist in relation to liability, they are not sufficient to defeat certification. Manageability is not a separate

area of inquiry in considering certification under Rule 23(b)(3), but merely a secondary problem to consider. *Id.* (citing *Gulish v. United States*, 78 F.R.D. 515, 518 (W.D. Pa. 1978)). The more important considerations are the predominance of common questions and superiority of the class action. *Id.* "Manageability problems must be factual, unavoidable obstacles to the litigation before they can be considered obstacles to class certification." *Id.* (citation omitted). Accordingly, the Court finds certification of the issue of actual damages is proper under Rule 23(b)(3).

CONCLUSION

1. For the foregoing reasons, the Court **GRANTS** Plaintiffs' Motion to Certify the Class. Named Plaintiffs Castillo and Hunt are **CERTIFIED** as the representatives of the class defined as follows: All persons to whom Defendant mailed a collection demand at any time since December 5, 2004, (1) which included a demand for both interest and a statutory service charge or a dishonored check; (2) where the check was written in the State of California for personal, family or household purposes; and (3) whose mail was not returned as undeliverable.

2. It is **FURTHER ORDERED** that the issues of liability, declaratory relief, and statutory damages under the FDCPA for those class members who did not pay any portion of the statutory service charge demanded is **CERTIFIED** under Rule 23(b)(2).

3. It is **FURTHER ORDERED** that the issues of actual damages under the FDCPA for those class members who paid any portion of the statutory service charge demanded is **CERTIFIED** under rule 23(b)(3).

IT IS SO ORDERED.

Dated: March 20, 2007

/s/ Martin J. Jenkins
MARTIN J. JENKINS,
UNITED STATES DISTRICT JUDGE